181 (3)

Supreme Court, U.S.
FILED
JAN 13 2011
OFFICE OF THE CLERK

No. 10-1196

IN THE

Supreme Court of the United States

NOVARTIS PHARMACEUTICALS CORPORATION,
Petitioner,

v.

PEGGY L. STEVENS,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the State of Montana

REPLY BRIEF FOR PETITIONER

JOE G. HOLLINGSWORTH
Counsel of Record
KATHARINE R. LATIMER
REBECCA A. WOMELDORF
HOLLINGSWORTH LLP
1350 I Street NW
Washington, DC 20005
(202) 898-5800
jhollingsworth@hollingsworthllp.com
Counsel for Petitioner

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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REPLY BRIEF FOR PETITIONER

Respondent dismisses as not "remotely possible" Opp'n. 37-38, petitioner's suggestion, Pet. 24, that havoc would result from application of class action tolling based on pending federal class action disputes such as *Dukes v. Wal-Mart*, 603 F.3d 571, 577-78 (9th Cir.), *cert. granted*, 131 S. Ct. 795 (2010). Respondent assures that the Montana Supreme Court reserved the discretion to find class action tolling inappropriate in a future *Dukes* scenario (*i.e.*, a putative nationwide federal class action filed on behalf of millions of individuals and pending for more than a decade). Accepting respondent's characterization, the Montana Supreme Court's application of a case-specific class action tolling rule is exposed for what it is: a constitutionally-infirm way to leverage Rule 23

to permit a plaintiff to proceed with time-barred individual claims on the theory that a defendant targeted by a federal class action lawsuit cannot possibly suffer prejudice by one more lawsuit, even a time-barred one involving different claims from the putative class action at issue. Montana's case-by-case approach to the availability of class action tolling cannot achieve the theoretical benefit behind the doctrine – the reduction of individual case filings. The sole upshot of the Montana rule is to arbitrarily deny defendants repose from time-barred claims.

A state court cannot insulate its decision from review by opting not to address a constitutional objection unambiguously raised. Here, the Montana Supreme Court's endorsement of class action tolling necessarily rejected all of NPC's challenges to the application of class action tolling, including its due process challenge.

I. NPC Presented Its Constitutional Due Process Challenge To The Application Of Class Action Tolling Below.

While respondent complains that NPC did not properly raise its challenges – including its due process challenge – to the application of class action tolling below, *the Montana Supreme Court considered and rejected Respondent's (nearly verbatim) argument below*. Pet. App. 9a; 8/16/10 Motion. Nor should NPC's arguments below have surprised respondent: she conceded that she did not rely upon the pendency of the never-certified federal class action with regard to the filing of her own claim. Given this record, and given that the putative class action had been pending in Tennessee – a state that has rejected the class action tolling doctrine – NPC argued below that it could not have "reasonably anticipated that

Montana, or any state, would deem its limitations period 'tolled' by the pendency of the Tennessee suit." 7/1/10 Reply at 16.

Respondent observes that she, rather than petitioner, first injected federal law into the case when she "cited [*American Pipe* and *Crown, Cork & Seal*] for the principle that tolling pending a class action is a reasonable compromise between the interest in timely notice served by statutes of limitations . . . " Opp'n. 4. But respondent's observation simply underscores that the applicability of federal precedents regarding class action tolling were actually litigated below.

Finally, the cases cited by respondent are clearly distinguishable from the facts here. For example in *Adams*, this Court rejected petitioner's contention that they properly presented their federal due process claims by simply referring to a couple of federal cases "in the midst of an unrelated argument" in their state court briefs. *Adams v. Robertson*, 520 U.S. 83, 88 (1997) (quoting *Bd. of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 550, n.9 (1987)). Unlike the petitioners in *Adams*, NPC here expressly and properly raised its due process argument in its state court appellate reply brief.[1]

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[1] The other cases on which respondent relies are similarly inapposite. *See also Board of Directors of Rotary Int'l*, 481 U.S. at 549-50 (federal claim first asserted in petition for rehearing that was denied without opinion was not "properly presented" in state court); *Webb v. Webb*, 451 U.S. 493, 497-99 (1981) (failure to cite basis for full faith and credit claims rendered them not properly presented when sole issue in the case involved interpretation of state statute regarding child custody issues); *Illinois v. Gates*, 462 U.S. 213, 220-21 (1983) (petitioner never

The fact that the Montana Supreme Court failed specifically to address NPC's federal due process arguments is not dispositive. Respondent admits – as she must – that this Court's jurisdiction to consider a federal claim extends to federal questions that were "either addressed by *or properly presented to* the state court that rendered the decision it has been asked to review." Opp'n. 19 (emphasis added) (citing *Adams*, 520 U.S. at 86. *See also New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 66 (1928) (holding that federal question was properly presented if the "necessary effect of the judgment has been to deny the [federal] claim"). "The issue whether a federal question was sufficiently and properly raised in the state courts is itself ultimately a federal question, as to which this Court is not bound by the decision of the state courts." *Street v. New York*, 394 U.S. 576, 583 (1969) (holding that federal question, though not discussed in lower court rulings, was properly before this Court because petitioner's state court motions included specific arguments that his federal rights had been violated).

This Court accepts jurisdiction over cases involving less conspicuous presentations of federal questions than the unambiguous language included in NPC's argument to the Montana Supreme Court. For example, just days ago this Court granted *certiorari* and vacated a state court's judgment on federal preemption grounds in a case where the petitioner had not specifically asserted its preemption claim until *after* the state courts had already rejected its appeals under state law. *Sonic Auto., v. Watts*, No. 10-315 2011 WL 1631040 (U.S. May 2, 2011);

"raised or addressed the question whether the federal exclusionary rule should be modified in any respect" in state courts).

Respondent's Brief in Opposition to Petition for Writ of Certiorari, *Sonic Auto., v. Watts*, No. 10-315 2010 WL 3905541, at *8 -*14 (U.S. Oct. 1, 2010) (preemption not asserted until petition for rehearing stage); Pet'r's Reply Br., *Sonic Auto., 2752 Laurens Rd., Greenville, Inc. v. Watts*, No. 10-315 2010 WL 4022702, at *3 -*5 (U.S. Oct. 13, 2010) (only referred to "federal policy" in favor of class action arbitration, rather than specifically arguing preemption, prior to petition for rehearing).[2] The South Carolina Supreme Court's denial of the *Sonic Automotive* petitioner's petition for a rehearing "wholly based on state law grounds" and without mention of the federal preemption argument did not deter this Court from concluding that the federal preemption issue was necessarily decided by the South Carolina Supreme Court, and thus subject to this Court's review.

Because NPC specifically raised its due process challenge in the state court below, this Court has jurisdiction to determine whether the application of class action tolling violates NPC's constitutional rights.

II. Application Of Class Action Tolling In Circumstances Like Those Here Is Fundamentally Unfair And Thus Violates Core Due Process Principles Long Recognized In This Court's Jurisprudence.

A primary inquiry in nearly every case that has analyzed *American Pipe* and the class action tolling

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[2] *See also Hathorn v. Lovorn*, 457 U.S. 255, 259-63 (1982) (first assertion of federal right at petition for rehearing stage was properly presented giving rise to review by this Court).

doctrine has analyzed whether its application would be unfair to the defendant, an inquiry which implicates the fundamental fairness analysis lying at the very heart of the Due Process Clause. Indeed, this Court has long recognized that fairness to litigants is the essence of any analysis of the Due Process Clause of the Fourteenth Amendment. *See, e.g., Morgan v. United States*, 304 U.S. 1, 19-20 (1938) ("fundamental requirements of fairness . . . are of the essence of due process in a proceeding of a judicial nature"); *Danforth v. Minnesota*, 552 U.S. 264, 269-70 (2008) ("ratification of the Fourteenth Amendment radically changed the federal courts' relationship with state courts . . . [because it] imposes minimum standards of fairness on the States" (internal quotation omitted)); *Rivera v. Illinois*, 129 S. Ct. 1446, 1454 (2009) ("The Due Process Clause, our decisions instruct, safeguards not the meticulous observance of state procedural prescriptions, but 'the fundamental elements of fairness in a criminal [or civil] trial.'"); *Halbert v. Michigan*, 545 U.S. 605, 611 (2005) ("due process concern homes in on the essential fairness of the state-ordered proceedings").

Respondent's contention that no class action tolling cases have been "resolved based on a due process or other constitutional basis," Opp. at 36-37, completely ignores the boundaries this Court has imposed on the class action doctrine from the outset. The two cases on which respondent, and the courts below, rely most heavily are prime examples of the inherent importance of fundamental fairness – and thus due process protection – in any class action tolling analysis. From this Court's first enunciation of the doctrine in *American Pipe*, this Court emphasized that class action tolling would be appropriate only where the core "polic[y] of ensuring essential fairness to

defendants" had been adequately satisfied. *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 554-55 (1974). This Court later expounded on the critical importance of fairness in class action tolling analyses when Justice Powell declared that "[c]laims as to which the defendant was not fairly placed on notice by the class suit are not protected under *American Pipe* and are barred by the statute of limitations." *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 355 (1983) (J. Powell, concurring).[3]

This Court's focus on fairness in analyzing the applicability of the class action tolling rule is not surprising considering its repeated acknowledgement that the underlying purpose of statutes of limitations is to ensure fairness to defendants. *See Rothensies v.*

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[3] Many state courts have followed this Court's lead in demanding fair notice to defendant before applying class action tolling. *See Jolly v. Eli Lilly & Co.*, 751 P.2d 923, 934-35 (Cal. 1988) (refusing to extend class action tolling rule to save untimely personal injury claims while noting that the one of two "major policy considerations" underlying the *American Pipe* tolling rule is "the effectuation of the purposes of the statute of limitations" which includes " 'ensuring essential fairness to defendants' ") (quoting *American Pipe*, 414 U.S. at 554-55); *Bell v. Showa Denko K.K.*, 899 S.W.2d 749, 758 (Tex. App. 1995) (refusing to toll statute of limitations in mass personal injury claim because the "basic premise of the *American Pipe* ruling is that a statute of limitations can be tolled while class allegations are pending, provided the defendant has notice of the type and potential number of the claims against it"); *Staub v. Eastman Kodak Co.*, 726 A.2d 955, 967 (N.J. Super. App. Div. 1999) (tolling applicable for mass personal injury claims only if plaintiff's "identity was disclosed or readily ascertainable upon the filing of the class action or upon its amendment within the period of limitations or who shows that he has deferred filing an individual suit in reliance on the pendency of the class action").

Elec. Storage Battery Co., 329 U.S. 296, 301 (1946) ("a statue of limitation is an almost indispensable element of fairness"); *Burnett v. New York Central R.R. Co.*, 380 U.S. 424, 428 (1965) ("Statutes of limitations are primarily designed to assure fairness to defendants.").

Indeed, the Court has applied fairness principles to reject tolling in circumstances where the defendant had much more notice of the specific claims against it than did NPC in this case. For example, in the employment discrimination case *Johnson v. Ry. Express Agency, Inc.*, 421 U.S. 454, 466-67 (1975), the Court rejected an employee's argument that his filing and active pursuit of an administrative complaint for employment discrimination with the Equal Employment Opportunity Commission effectively tolled the statute of limitations for filing a claim for damages under 42 U.S.C. § 1981 involving the same underlying facts. Even though the employer in *Johnson* was indisputably aware of the specific claims asserted by the specific employee years before the statute of limitations would have run on the § 1981 federal claim, this Court found tolling unfair to the defendant because the claims in the second action were not identical to the claims in the first. 421 U.S. at 466-67. Just one year after *American Pipe*, the Court rejected petitioner Johnson's bid for *American Pipe* class action tolling because tolling applies "[o]nly where there is complete identity of the causes of action"). *Id.* at 467 n.14.

The Montana Supreme Court's rationale that a defendant "is only entitled to be noticed of the nature of claim," Pet. 19, n.4, and that a pharmaceutical manufacturer has been provided fair notice of the "nature" of subsequent individual claims under

American Pipe so long it is involved in *any* personal injury litigation concerning a specific drug, flies in the face of this Court's holding in *Johnson*.

As articulated at pages 12-13 of the Petition, a mass tort personal injury putative class action complaint fails to provide *any* notice, let alone fair notice, of the specific claims and identities of unnamed plaintiffs, their treating physicians, medical history, and other evidence critical to the claims and defenses in such cases (*e.g.*, specific causation, proximate cause, notice of warnings, etc.). Therefore, imposing the *American Pipe* tolling rule in such circumstances, such as in this case, results in the type of fundamental unfairness and implicit breach of due process that *American Pipe* and its progeny have cautioned against.

III. The Court Should Address The Fundamental Unfairness Of Applying Class Action Tolling To A Pharmaceutical Mass Tort Personal Injury Case.

Respondent misapprehends the relevance of the California Supreme Court's refusal to apply the class action tolling rule in a case, like this case, involving the tolling effect of a never-certified personal injury class action. *See Jolly*, 751 P.2d at 933-38. In *Jolly*, the California Supreme Court clearly stated the issue before it: "The question to be asked, then, is whether [claims supposedly tolled under a pending] mass-tort class action fits the rationale of [*American Pipe*]. We believe the answer is no." *Id.* at 934 (citations omitted). In so holding, the court engaged in a thorough discussion of why class action tolling is particularly inappropriate in mass tort claims, whether based on the similar causes of action for either medical monitoring or personal injury. *Id.* at 933-38. The

court held, among other things, that "courts should utilize the procedures of rule 23 of the Federal Rules of Civil Procedure (28 U.S.C.) to ensure fairness in the resolution of class action suits," *id.* at 933, that mass torts are generally " 'not appropriate for class litigation . . . based upon the overwhelming uniqueness of the issues stemming from the necessity for the trier of fact to hear and determine individually each victim's injuries,' " *id.* at 934, and that "major elements in tort actions for personal injury – liability, causation, and damages – may vary widely from claim to claim . . ." *Id.* at 936. The court further observed that personal injury mass tort claims, like respondent's claims here, are so unique and fact-specific that "such claims may be presumptively incapable of apprising defendants of 'the substantive claims being brought against them,' a prerequisite, in our view, to the application of *American Pipe*." *Id.* at 937 (citing *American Pipe*, 414 U.S. at 55 and *Crown, Cork & Seal*, 462 U.S. at 353). The court concluded that "[t]he same reasons that render certification of mass-tort claims generally inappropriate render inappropriate the application and extension of [*American Pipe*] to the present case." *Id.* at 936. Respondent's complaint that the well-conceived rationale underlying this holding represents *dicta* makes no sense and contradicts the plain language of the court's holding.

Respondent also contests, Opp'n. 33, petitioner's observation that no pharmaceutical personal injury class "has been certified over opposition and survived in the federal system since [*Ortiz*] and [*Amchem*]. *See* Pet. 8. Not surprisingly, however, respondent cites no example of any such case in support of her claim. None exists.

Finally, *Chase Securities. Corp. v. Donaldson*, 325 U.S. 304 (1945), cited by respondents, Opp'n. 30, actually recognizes that while statutes of limitations are creatures of state law, their application can offend federal constitutional protections. *Chase* involved the retroactive application of a newly created statute of limitations specifically for securities actions; as petitioner has explained, tolling based on a securities class action does not implicate the same issues of fair notice as mass tort class actions. (*See* Pet. 15-16.) Indeed, the Court recognized in *Chase* that "statutes of limitation like other types of legislation could be so manipulated that their retroactive effects would offend the Constitution" in certain circumstances. 325 U.S. at 315-16. This is such a case.

CONCLUSION

For the foregoing reasons, and the reasons outlined in the Petition, the Court should grant the Petition for Writ of *Certiorari*.

Respectfully submitted,

JOE G. HOLLINGSWORTH
Counsel of Record
KATHARINE R. LATIMER
REBECCA A. WOMELDORF
HOLLINGSWORTH LLP
1350 I Street NW
Washington, DC 20005
(202) 898-5800
jhollingsworth@hollingsworthllp.com

Counsel for Petitioner

May 10, 2011